PREME COURT, U. S.

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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-616

J. ELBERT PETERS; DR. WILLIAM H. GRAHAM; JAMES W. TICE; AND WYLEY D. WARD, individually and on behalf of all those similarly situated, *Petitioners.*

v.

DUDLEY CLARK, EDWIN JONES, JAMES BELL, LAWRENCE COBB, and JAMES RECORD, Chairman, as members of the Madison County Board of Commissoners of Madison County, Alabama; ASHFORD TODD, Judge of Probate of Madison County, Alabama; JERRY CRABTREE, Sheriff of Madison County, Alabama; ALVIN BLACKWELL, Chairman of the Madison County Democratic Executive Committee; and LAWRENCE R. JUDD, Chairman of the Madison County Republican Executive Committee, *Respondents.*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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Petitioners pray that a writ of certiorari issue to expedite the relief prayed for in the United States Court of Appeals for the Fifth Circuit, which heard oral arguments on March 20, 1972 but has failed to render judgment.

OPINIONS BELOW

The United States Court of Appeals for the Fifth Circuit has not rendered an opinion, nor a judgment in the case on appeal (No. 72-1093). The judgment of dismissal and the opinion of the United States District Court for the Northern District of Alabama, dated December 14, 1971, is not reported, but set out in the Appendix, *infra*, at pp. 1a-4a.

JURISDICTION

The judgment of the district court was appealed to the United States Court of Appeals for the Fifth Circuit on December 30, 1971, and oral arguments were heard on March 20, 1972, but judgment has not heretofore been rendered. This Court has jurisdiction under 28 U.S.C. Section 1254(1).

QUESTION PRESENTED FOR REVIEW

1. Whether a county apportionment scheme containing districts for candidates coupled with at-large voting is constitutional where there are no provisions for "floater" representatives and where 78 per cent of the county's electorate reside in one district and 22 per cent reside in the remaining four districts.

STATE STATUTORY PROVISION INVOLVED

Act No. 1739 of the General Sessions Volume of the 1971 Legislature of Alabama, Section One:

> Any other provisions of law notwithstanding one member from each of the districts into which Madison County, Alabama is divided, as said districts are constituted and defined on January 1 of the year of election, shall be elected in the 1972 general election and at the general election held every four years thereafter to serve for four years from the

time of their installation in office and until their successors shall be elected and qualified, such installation to take place on the first Monday after the second Tuesday in January after their election. The chairman or presiding officer of the Madison County Commission or like governing body which may be created for Madison County, Alabama shall be the member elected from the district wherein the county seat is located. Each member so elected shall be a registered voter in and a resident of the district as so constituted and defined and each member shall be elected by the qualified voters of the county at large.

STATEMENT OF THE CASE

Petitioners challenge the apportionment plan for the Madison County Commissioners of Madison County, Alabama.[1] The Commission is elected by at-large vote of the entire county, but each of its five members must reside in different residential districts. The published 1970 Census of the county's population, published by the U.S. Department of Commerce, states the county's total population at 186,540, and one district alone comprises a population of 145,000, with the remaining districts being fairly apportioned, comprising a population of 41,540. The total deviation from the ideal between the largest and smallest districts is 473 per cent, since the ideal district size is 37,313. Four of the five representatives are elected from districts containing approximately 22 per cent of the population.

Petitioners include residents and qualified voters of the one largest district, and the respondents are the members of the commission, the county's probate judge and sheriff, and the chairmen of the county's Demo-

[1] Act Number 1739 of the General Sessions of the Legislature of Alabama of 1971.

cratic and Republican Executive Committees. The commission has general governmental powers of a local governing body under Title 12 of the Code of Alabama, amended 1941, which, *inter alia*, allowed the commission in the fiscal year ending September 30, 1971 to unequally disburse to the five districts so much of the county's total income allocated for bridge and road building purposes. [2]

Jurisdiction in the district court was based on 28 U.S.C., Section 1343 and the cause of action predicated on 42 U.S.C., Section 1983.

Petitioners allege that the holding of elections under the unequal district plan will violate their rights and those of individuals similarly situated under the due process and equal protection clauses of the Fourteenth Amendment to the Constitution of the United States. The district court dismissed the action after trial and petitioners appealed to the United States Court of Appeals for the Fifth Circuit on December 30, 1971. Oral arguments were heard on March 20, 1972, but a decision has not been rendered.

REASONS FOR GRANTING THE WRIT

1. Certiorari should be granted to resolve an important question concerning the proper application of the one-man one-vote principle to the apportionment of county governing bodies.

Respondents (defendants below) rested without adducing evidence immediately after petitioners (plaintiffs below) rested their case during the trial in the district court, and, therefore, failed to prove justi-

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[2]

	Population %	% of Disbursement
Districts 1, 2, 3 and 4	22	89
District 5	78	11

fication for the major disparities among the five districts. The population deviation is of such magnitude that invidious discrimination is inherent. *Gaffney* v. *Cummings,* 412 U.S. 735 (1973); *Reynolds* v. *Sims,* 377 U.S. 533 (1964). The district court relied on the teachings of *Dusch* v. *Davis,* 387 U. S. 112 (1967) in rejecting petitioners' federal claim that the plan offends the Fourteenth Amendment, without alluding to the fact that therein this Court approved the plan because it was designed to deal with the peculiar exigency created by the consolidation of a city and a county, the result of which was the consolidation of one of the largest area-wide cities in the United States. Moreover, the district court failed to account for the fact that the plan in *Dusch* made allowance for four "floater representatives" out of a total of eleven representatives.

2. Certiorari should be granted to resolve a conflict between the circuits.

The district court's opinion (rendered on December 14, 1971) conflicts with the fifth circuit's opinion in *Keller* v. *Gilliam,* 454 F.2d. 55 (5th Cir. 1972)—rendered on January 3, 1972—which struck a plan identical to the Madison County plan because, *inter alia,* no compelling need for the plan had been demonstrated to make allowance for major deviations among the five county government districts. The fifth circuit relied on *Dusch* v. *Davis, supra,* but reached a result opposite to that reached in *McCain* v. *Lybrand,* No. 74-1619 in the United States Court of Appeals for the Fourth Circuit (No. 74-278 in the Supreme Court of the United States, October Term, 1974), which protected against minority domination by a five member plan with five malapportioned districts by suggesting a

"Four-Four" plan so that four representatives would be elected without residence requirement ("floaters") and four would be elected with residence requirements.

If certiorari is *not* granted in *McCain* v. *Lybrand, supra,* the fifth circuit may well assume this Court's affirmance of the "Four-Four" plan and rule contrary to its *Keller* v. *Gilliam* decision, *supra,* in the instant case, and if certiorari *is* granted, petitioners herein respectfully request the consolidation of these two cases so that they may be argued as companion cases.

CONCLUSION

For the foregoing reasons, the petition for certiorari should be granted.

Respectfully submitted,

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